Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1963.

No. 1090

UNITED STATES OF AMERICA,

Respondent.

v.

MAX BLUM,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Max Blum, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that Court entered on March 10, 1964, which affirmed a judgment of conviction of the United States District Court for the Eastern District of New York and from a judgment of that Court entered on April 8, 1964 denying a petition for a rehearing *en banc*.

The petitioner was convicted in the United States District Court for the Eastern District of New York on No-

vember 20, 1962 on two counts of a five count indictment which charged the petitioner with violating U. S. C. C. Section 545, fraudulently facilitating the transportation of, and fraudulently receiving, 2,149 Swiss watch movements, knowing the same to have been illegally imported into the United States. The petitioner was sentenced to eighteen (18) months on each of the two counts, sentences to run concurrently. On January 23, 1963, petitioner appealed from this judgment to the United States Court of Appeals for the Second Circuit, and the original bail in the amount of $5,000.00 was continued. That on March 10, 1964, the judgment of conviction was unanimously affirmed. That on March 24, 1964, a petition was filed for a rehearing *en banc*, and on April 8, 1964 the petition for a rehearing was unanimously denied.

Opinions Below

That a copy of the opinion by the United States Court of Appeals for the Second Circuit is set forth in the Appendix, *infra*, page 23. That there was no opinion by the United States District Court, and there was no opinion by the United States Court of Appeals for the Second Circuit denying petitioner's application for a rehearing *en banc*.

Jurisdiction

Judgment of the Court of Appeals for the Second Circuit sought to be reviewed is dated March 10, 1964 and said judgment was entered on March 10, 1964. Said judgment is attached to the record filed with this Court. The denial of a petition for a rehearing, *en banc*, is dated April 8, 1964 and was entered on April 8, 1964. A copy thereof is set forth in the Appendix, *infra*, page 30.

Title 28, U. S. Code, Section 1254 (1) confers on this Court jurisdiction to review said judgment of the Court of Appeals for the Second Circuit by a writ of certiorari.

Questions Presented

1. Was the defendant denied due process (The United States Constitution, Amendment 5) when the United States Court of Appeals for the Second Circuit in interpreting Title 18, Section 1732, Rule 44 of the Rules of Civil Procedure and Rule 27 of the Criminal Code Procedure sanctioned the introduction in evidence, at the trial of the defendant of Government's Exhibit 15 (p. 36), a declaration signed by the Swiss Consul purporting to be proof of a lack of any record in the Swiss Consulate's office in New York, of the lawful importation of certain Swiss Watch Movements similar to those found in the petitioner's possession?

2. Were the defendant's Constitutional rights of due process denied to him when the United States Court of Appeals for the Second Circuit sanctioned the admission in evidence by the United States Government during the defendant's trial in the District Court, Exhibit 15 (p. 36) of a hearsay document and authentication signed by the Swiss Ambassador and the United States Secretary of State containing gratuitous statements highly prejudicial to the defendant?

3. Were the defendant's Constitutional rights (Constitution Amendments 4, 5 and 14) denied to him when the United States Court of Appeals for the Second Circuit sanctioned the denial by the trial justice of the defendant's motion to suppress evidence obtained by the United States Government illegally and without warrant contrary to law?

4. Did the United States Court of Appeals for the Second Circuit correctly affirm the defendant's conviction, even though the record clearly indicated that there was a complete failure of proof of the *corpus delicti* and that from the inadequate evidence adduced no valid inference could be drawn that the defendant was guilty of the crimes charged in the indictment?

Statutes Involved

Section 545 Title 18 U. S. Code

SMUGGLING GOODS INTO THE UNITED STATES

Whoever knowingly and willfully, with intent to defraud the States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, or Guam. June 25, 1948, c645, 62 Stat. 736.

18 U. S. C. Section 1732

(a) In any Court of the United States and in any Court established by an act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum, or record of act, transaction or occurrence or event shall be admissible as evidence of such act, transaction, occurrence, or event if made in regular course of any business, and if it was the regular course of such business and if it was made in the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

All such circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker may be shown to affect its weight, but such circumstances shall not effect its admissibility.

Rule 44 of the Rules of Civil Procedure Authentication of Copy

An official record or an entry therein when admissible for any purpose may be evidenced by an official publication or by a copy attended by the officer having the legal custody of the record, or by his deputy and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a Judge of a Court of Record of the district or political subdivision in which the record is kept authen-

ticated by the seal of the Court, or may be made by a public officer having a seal of office or having official duties in the district or political subdivision in which the record is kept, is in a foreign state or country the certificate may be made by a secretary of embassy or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept and authenticated by the seal of his office.

PROOF OF LACK OF RECORD

A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office accompanied by a certificate as above provided, is admissible as evidence that the record, of his office contains no such record or entry.

Rule 27 of the Code of Criminal Procedure

PROOF OF OFFICIAL RECORD

An official record or an entry therein or the lack of such a record may be proved in the same manner as in civil actions.

Rule 41(e) Rules of Criminal Procedure—Search and Seizure

* * * * *

(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is

insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

* * * * *

The Indictment

THE GRAND JURY CHARGES:

COUNT ONE

That on or about the 17th day of July, 1960, within the Eastern District of New York, the defendants, Max Blum and Jacob Sluis, did knowingly, wilfully, unlawfully and fraudulently facilitate the transportation after importation of merchandise imported into the United States contrary to law, to wit: approximately Two Thousand One Hundred Forty-nine (2,149) Swiss watch movements, knowing the same to have been imported into the United States contrary to law. (Title 18 United States Code, section 545 and 2.)

COUNT TWO

That on or about the 18th day of July 1960, within the Eastern District of New York, the defendants, Max Blum

and Jacob Sluis, did knowingly, wilfully, unlawfully and fraudulently conceal after importation merchandise imported into the United States contrary to law, to wit: approximately Two Thousand One Hundred Forty-nine (2,149) Swiss watch movements, knowing the same to have been imported into the United States contrary to law. (Title 18 United States Code, section 545 and 2.)

COUNT THREE

That on or about the 18th day of July 1960, within the Eastern District of New York the defendant, Max Blum, did knowingly, wilfully, unlawfully and fraudulently receive after importation merchandise imported into the United States contrary to law, to wit: approximately Two Thousand One Hundred Forty-nine (2,149) Swiss watch movements, knowing the same to have been imported into the United States contrary to law. (Title 18 United States Code, section 545.)

COUNT FOUR

That on or about the 18th day of July 1960, within the Eastern District of New York, the defendant, Max Blum, did knowingly, wilfully, unlawfully and fraudulently buy after importation merchandise imported into the United States contrary to law, to wit: approximately Two Thousand One Hundred Forty-nine (2,149) Swiss watch movements, knowing the same to have been imported into the United States contrary to law. (Title 18 United States Code, section 545.)

COUNT FIVE

That on or about and between the 1st day of April 1960 and the 18th day of July 1960, both dates being approximate and inclusive, within the Eastern District of New

York, the Southern District of California and divers other places to the Grand Jurors unknown, the defendants, Max Blum and Jacob Sluis, and divers other persons to the Grand Jurors unknown did knowingly, wilfully, unlawfully and fraudulently conspire, combine, confederate and agree together and with each other to commit offenses against the United States in that they did conspire and agree to conceal, receive, buy, sell and facilitate the transportation after importation of merchandise, to wit: approximately Two Thousand One Hundred Forty-nine (2,149) Swiss watch movements, which said watch movements had been imported into the United States contrary to law, the defendants then and there well knowing the same to have been imported into the United States contrary to law, such acts being violations of section 545 of Title 18 United States Code. (Title 18 United States Code, section 371.)

That in furtherance of the above conspiracy, and to effectuate the purpose thereof, the defendants did commit the following

Overt Acts.

1. In or about the month of April 1960 the defendants, Max Blum and Jacob Sluis, had a conversation at the Victoria Hotel in New York City.

2. On or about the 17th day of July 1960 the defendant, Jacob Sluis, caused two cartons to be delivered to the Railway Express Agency office at Chula Vista, California.

3. On or about the 18th day of July 1960, within the Eastern District of New York, the defendant, Max Blum, received two cartons at 140 Beaumont Street, Brooklyn, New York.

A True Bill.

Statement of the Case

The defendant was convicted after a jury trial in the Eastern District of New York on two counts, fraudulently facilitating transportation and receiving watch movements knowing the same to have been illegally imported, on a five count indictment charging the petitioner with a violation of 18 U. S. C., Section 545 and conspiracy to do so. The jury found the petitioner not guilty on two substantive counts, charging fraudulently concealing and buying and the fifth count a conspiracy was severed. The petitioner was sentenced to 18 months' imprisonment on each of the two counts, sentences to run concurrently.

On March 10, 1964, the judgment of conviction was unanimously affirmed by the United States Court of Appeals for the Second Circuit and on April 8, 1964, the United States Court of Appeals for the Second Circuit unanimously denied petitioner's application for a rehearing.

The Government witnesses testified that on July 15, 1961 a "Mexican fellow" delivered a carton to a clerk for the Railway Express Air Division, San Diego, California, consigned to the petitioner in Brooklyn, New York. The Railway Express clerk notified a custom agent of the delivery. On the following morning the same "Mexican fellow" brought in another carton with the same consignor and consignee.

The Railway Express clerk refused permission to United States Customs Agent to open and examine the two cartons. However, the Custom Agent examined the carton with an instrument characterized as an "electronic device" and testified that according to his readings on the "electronic device" the package contained radio active material. No effort was made to qualify the agent as

an expert on electronic devices and no effort was made by the Government to obtain further information as to the type of testing machine used by the agent, said agent stating that the "electronic device" was "classified information".

The two cartons were thereafter shipped by air, and a Custom Agent at Idlewild Airport located and removed the cartons to a special office located in Brooklyn. The Custom Agent again examined the packages with an "electronic device," and according to his readings of this "classified" machine testified that the cartons indicated the presence of radio active material. The package was opened by the Custom Agent, inspected, and found to contain 2,149 Swiss Watch Movements without any importer's symbol.

The Watch Movements were thereupon replaced in the original cartons, resealed, and then for the first time a search warrant was obtained.

Thereafter, the Custom Agent, assisted by employees of the Railway Express, delivered the two cartons to the defendant's home which he also used as his workshop.

The Customs Agents returned within one half hour, recovered the original cartons and arrested the defendant. The defendant's explanation was that one Sluis, the consignor, had asked him previously for permission to mail certain packages or cartons which Sluis would subsequently pick up during his periodic visits to New York.

There is no direct evidence that the Swiss Watch Movements had been brought into the United States contrary to law. The Government admitted that Swiss Watch Movements, even though not stamped with importer's symbols, were not contraband *per se*, and that the mere

possession of unsymboled watch movements raised no presumption that they had been imported contrary to law.

In order to prove unlawful importation, the United States proceeded on a theory that the Watch Movements could not have entered the United States lawfully without some official record being made of the importation.

The testimony indicated that all the Watch Movements were manufactured after 1954. The Government then introduced certification by 45 Collectors purporting to show that they found no record of importation of the Swiss Watch Movements since 1954 that correspond to the movements found in the defendant's possession, but no certification for the Port of New York was introduced.

However, an examination of the 45 Certificates (Government's Exhibit 10) patently indicates that said Exhibit does not prove what the Government claimed. Nine out of the 45 Certificates failed to check back that there are no records of the lawful entry of Swiss Watches of the same description since January, 1954.

The Certificates submitted for 9 ports of entry reflect respective searches of records which did not begin with 1954, but rather many years later, and therefore, these exhibits do not preclude, but rather open a rather wide hiatus to the real possibility of the legal entry of the watch movements in question.

The following is a list of Certificates which fail to cover the required period from January 1, 1954:

El Paso from December 31, 1957;
Los Angeles from July 1, 1957;
Mobile from July 1, 1959;
New Mexico from September 16, 1959;
Ohio from January 6, 1958;

Philadelphia from July 1, 1958;
Pittsburgh from July 1, 1957;
St. Louis from January 1, 1958;
North Carolina from July 1, 1956.

The opinion of the United States Court of Appeals for the Second Circuit herein, in considering the probative value of the 45 Exhibits admitted:

> "This proof was clearly not conclusive for it omitted New York and five of the Certificates failed to check back to 1954."

In order to prove that there was no record of the legal importation of the Swiss Watch Movements found in the defendant's possession, the government adopted a still further circuitous and novel theory. To prove that the watch movements could not have been legally imported through the New York Port, the Government introduced into evidence a combination of Exhibits, namely, the U. S. Treasury Department, Circular Letter 2088, issued on June 19, 1940, stating the following:

> "In all cases where Swiss Watch Movements are imported without distinguishing symbol * * * the Swiss Consul General in New York should be furnished full particulars concerning the action". (Government Exhibit 12, p. 32).

together with the Declaration of the Swiss Consul whose office is located in New York City, attested to by the Swiss Ambassador to the United States and in turn certified by the then Secretary of State, Dean Rusk (Government Exhibit 15, p. 36). The purport of these documents was to negate the receipt by the Swiss Consul of particulars from Customs agents with respect to the importation of Watch movements similar to those found

in the defendant's possession. The defendant objected to the introduction of Exhibit 15 as improper and further that the Certificate bearing the signature of the Swiss Ambassador and certified by the then Secretary of State, Dean Rusk, contained facts and were purely hearsay and not admissible under any section of law. The defendant also objected to the introduction of the declaration of the Swiss Consul regarding the non-existence of records on the ground that Rule 44 of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure, were not applicable.

The United States Court of Appeals for the Second Circuit in its opinion, supported the admissibility of Exhibits 12 and 15 under Section 18, U. S. C. Section 1732 of this document; in addition to F.R.C.P. 44(c), and F.R. Crim. Proc. 26 and 27.

It was the Government's theory that unless there was a record of lawful importation of these Watch Movements, the watches had been smuggled into the United States.

To contradict this assumption, the petitioner introduced uncontradicted testimony elicited from Government witnesses during cross-examination, and of petitioner's witnesses during direct examination, that unsymboled watches and movements that had originally been smuggled into the United States, of which there obviously could be no records of legal entry, were sold in large quantities at public auction conducted by Customs, as often as four times a year.

The purpose of this testimony was to prove that good, legal and transferable title to unsymboled watches and watch movements, entered into the United States illegally, is acquired by any purchaser at said public auctions, and

that transportation and possession thereof is not illegal, despite the fact that "no record of lawful importation" can exist for such merchandise.

Reasons Relied on For the Allowance of the Writ

1

The United States Court of Appeals for the Second Circuit has in this case decided an important question of Federal Law in this case by extending a novel interpretation of 18 U. S. C., Section 1732, F.R.C.P. 44(c) and F. R. Crim. Proc. 26 and 27 to the admissibility of documents in a criminal proceeding. This interpretation has not been, but should be settled by this Court, as new principles governing the Rules of Evidence have been introduced for the first time which may become inimical to a defendant's right to a fair trial.

The United States Court of Appeals for the Second Circuit in its opinion herein states that without the certification of the Swiss Consul, Exhibit 15 (p. 36), all other proof was "clearly not conclusive".

A reading of Section 44 of the Federal Rules of Civil Procedure which is incorporated by reference to the Federal Rules of Criminal Procedure, Sections 26 and 27, does not authorize the admission of Exhibit 15. The opinion of the United States Court of Appeals for the Second Circuit herein, implies that Rule 44 Subdivision (a) was not complied with but that there was substantial compliance with the "spirit" of said rule.

There is no reason why Rule 44, which drastically changes our common law and is a statutory exception to the hearsay rule, should not be strictly construed, particularly in a criminal case, and more particularly when

the determination of the innocence or guilt of this defendant rests upon the admissibility of this very document.

Rule 44 of the Rules of Civil Procedure concerning authentication of copies has specific reference to an official record or entry therein. A letter sent by a Custom Agent to the Swiss Consul is not an official record or entry therein. The real test that makes a record official is that there is a public duty imposed, either by law, or a higher authority, on the officer to keep such record.

The theory is based upon the assumption that a public official who has a public duty, or is responsible to a higher officer, will not alter or suppress public records. There is no proof that the Swiss Consul in New York had a public duty imposed by law by a higher officer to keep a record of, and keep intact, all letters received by him from United States Custom Officials relating to the importation of unsymboled watch movements.

There is no proof that the Swiss Consul had kept such letter intact, or that a record was made of such letters as they arrived, or that the records he searched included all the letters received by his office from New York Custom Officials relating to unsymboled watches. There is no proof that the Swiss Consul in New York was the permanent depository for reports made by Collectors of Customs and it is possible and probable that these reports may have been removed during the past six (6) years and forwarded to another agency by the Swiss Consul.

The authentication was improper and it is submitted that "substantial compliance" with, or in the "spirit" of Rule 44 does not obviate the necessity of compliance with this Rule in the introduction of evidence in a criminal case. The authentication by the Secretary of State was not the authentication provided by Rule 44.

The opinion herein by the United States Court of Appeals for the Second Circuit states that this document is admissible under 18 U. S. C., Section 1732, "The Shop Book Rule", and quotes as authority *United States v. New York Foreign Trade Zone Operators*, 304 F. 2d 792 (C. I. R. 1962). However, a careful reading of this case (Judge Moore dissenting) clearly indicates that every paper or document is not admissible in evidence unless it is shown that the person making the entry was under a duty to make these entries, and that the records were prepared and kept for the systematic conduct of business, regularly kept and maintained in regular books and records. It is also interesting to note that the Foreign Trade Case was a civil action and not a criminal case.

This court in *Palmer v. Hoffman*, 318 U. S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943), outlined the limitations in the application of 18 U. S. C., Section 1732.

Section 18 U. S. C. 1732 does not apply in this case because it was not established that books and records were regularly kept in the office of the Swiss Consul indicating entries of reports sent to the Consul by an outside agency. The certification submitted by the Swiss Consul clearly was not a book or record properly entered under the Shopbook Rules.

It is submitted that the extension of existing law 18 U. S. C. Section 1732 F. R. C. P. 44 (c) and F. R. Crim. Proc. 26 and 27 by the tortured construction to permit the introduction into evidence of Government Exhibit 15, was tantamount to a denial to the defendant of due process of law (U. S. Constitution Amendment V).

2

The certification of Dean Rusk, the then Secretary of State and the note of the Ambassador of Switzerland,

dressed to the Secretary of State couched in polite diplomatic language gave the declaration of the Swiss Consul a dignity and solemnity wholly unwarranted by its contents, thus attested and certified with ribbons and seals.

This exhibit conveyed to a jury of laymen a falsely imposing and impressive sanctity to the gratuitous hearsay statement of the Swiss Ambassador and gave undue weight to the declaration of the Swiss Consul.

It is obvious that the Certification by the Ambassador of Switzerland and the imposing authentication by the Secretary of State of United States, greatly impressed a jury who obviously accepted the Consul's statement as an official, truthful admission authenticated by a highly respected and important government official, the United States Secretary of State.

It is also significant to note the phraseology of the Swiss Ambassador attestation:

> "Mr. Gasser was to testify that no report had been made to the Swiss Consul General with requirements stated in the Bureau of Customs' letter No. 2088, dated June 19, 1940, concerning the arrival at any port of entry of 2,149 unsymboled watches and watch movements in this case." (Government's Exhibit [illegible]: 36).

The declaration however by the Swiss Consul, Mr. Gasser, does not bear out the Ambassador's statement. Mr. Gasser's declaration makes no mention of reports made to the Swiss Consul General in accordance with requirements of Customs' Circular Letter No. 2088, dated June 19, 1940, concerning the arrival at any port of entry of approximately 2,149 unsymbolled watches. He omits this reference, but mentions "inquiries or replies" concerning importation of unsymboled watches.

The admission of that part of Government's Exhibit 15 which was a letter sent by the Ambassador of Switzerland to the Secretary of State and the authentication by the Secretary of State was unwarranted and was tantamount to a denial of due process (Constitutional Amendment, U. S. Constitution V).

3

The Government, without a warrant, first examined the two cartons which had been delivered to the American Express Office in San Diego by an instrument which was characterized as an electronic device, and that subsequently, the cartons were taken from the Airport at Idlewild by the United States Custom Agents and then opened, examined and repacked.

Ever since the Supreme Court decision, *Ex-Parte, Jackson* (1877) 96 U. S. 727, it has been regarded as settled law that the protection against unwarranted search and seizures of one's papers or other effects, guaranteed by the Fourth Amendment, extends to their presence in the mail. The Constitutional prohibition clearly extends to unwarranted search and seizures of packages delivered to the American Express.

The evidence secured in violation of the petitioner's Constitutional protection against unwarranted search and seizures should have been suppressed (*McDonald* v. *U. S.*, 335 U. S. 451, U. S. Constitutional Amendment, No. 4).

4

There was a complete failure of proof. The defendant was denied due process of law when the Government failed to prove the defendant's guilt. Due process commands that no man shall lose his liberty unless the Government has fully borne the burden of proving his guilt.

This proof must be based upon evidence, and not upon surmise or suspicion. *Spencer* v. *Randell*, 78 S. C. P. 1332, 357 U. S. 513, 2 L. Ed. (2) 1460 rehearing denied 79 S. Ct. 12, 358 U. S. 860, 3 L. Ed. (95) *Pierce* v. *City and County of San Francisco*, 79 S. C. T. 13, 358 U. S. 60, 3 L. Ed. (2) 95.

The Government had the burden of proving the *corpus delicti*, the fact that a crime had been committed. The *corpus delicti* cannot be presumed and must be established by competent evidence. *Christo-Hoe* v. *United States*, 338 U. S. 84.

The *corpus delicti* in this case was the illegal importation, the smuggling of the Watch Movements specifically mentioned in the indictment.

The Government attempted to prove the illegal importation of the Swiss Watch Movements by circumstantial evidence.

As stated in the opinion herein by the United States Court of Appeals for the Second Circuit, "in order to prove unlawful importation the United States proceeded on the theory that the Watch Movements could not have entered the United States lawfully without some official record being made of the importation".

The defendant, however, proved and established, without any contradiction, that watch movements which had been originally smuggled into the United States, and where obviously there was no record of legal importation, were periodically sold at public auction by the Custom Services. The defendant proved, without contradiction, that smuggled and seized watch movements without any importers' symbols were sold in large quantities at public auction by United States Custom Agents. The pertinent point here is, that there is "no record", and there

could be "no record" of lawful importation of unsymboled watches, seized and sold at public auction and it therefore, follows, that the Government's case collapsed when it failed and omitted to prove this essential part of its "no record" theory.

It was proven that it is possible for a person to legally purchase and gain legal possession of unsymboled watch movements which may have been purchased at public auction conducted by the Custom Service and that unsymboled watch movements so purchased had illegally entered the United States foreclosing the possibility of an official record of their "legal importation".

The defendant's guilt must rest on the assumption that from December, 1954 until July, 1962 a period of 6 years, every agent in the United States Custom Service obeyed the directive to notify the Swiss Consul.

This is an unwarranted assumption. The defendant's conviction rests solely upon faceless witnesses who did not come forward to testify, and the defendant, was deprived of the right to face his accusers and to cross-examine.

The defendant's conviction was based upon the numerous clerks and office help that allegedly made a search of records in 45 Custom Service Ports of Entry. It is based upon the nameless persons who allegedly made a search in the Swiss Consulate Office. It is based upon the nameless hundreds of unknown persons in the Custom Service who were supposed to obey a circular letter and make a report to the Swiss Consul. It is based upon the nameless and countless stenographers and mail clerks that were supposed to send out letters to the Swiss Consul properly prepared and properly addressed.

The defendant's guilt and deprivation of his freedom depends upon an unwarranted assumption that each and everyone of these hundreds of persons complied and the tragedy in this case is that the defendant was denied his right to cross-examine and to show the possibility of mistake and human error.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted.

BENJAMIN SEIT,
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APPENDIX

Opinion by United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 270—September Term, 1963.

(Argued January 17, 1964 Decided March 10, 1964.)

Docket No. 28134

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MAX BLUM,
Defendant-Appellant.

Before:

Lumbard, Chief Judge,
Swan and Smith, Circuit Judges.

Appeal from judgment of conviction in the United States District Court for the Eastern District of New

York on a jury verdict on charges of fraudulently facilitating transportation of and fraudulently receiving 2,149 Swiss watch movements knowing the same to have been imported into the United States contrary to law, Walter Bruchhausen, District Judge. Affirmed.

Jerome F. Matedero, Special Asst. U. S. Attorney, Eastern District of New York, Brooklyn, New York (Joseph P. Hoey, United States Attorney, Eastern District of New York, on the brief), for appellee.

Isidore Beerman, of Beerman, Gaspari & Beerman, New York, N. Y., for appellant.

Smith, Circuit Judge:

Max Blum appeals from concurrent 18 months sentences of imprisonment imposed by District Judge Walter Bruchhausen after conviction on trial to the jury in the Eastern District of New York on two counts, fraudulently facilitating transportation and receiving Swiss watch movements knowing the same to have been illegally imported, of a five-count indictment charging violation of 18 U. S. C. Sec. 545 and conspiracy to do so. The jury found Blum not guilty on two substantive counts, charging fraudulently concealing and buying, and the fifth count, a conspiracy count, was severed. We find no error to the two-count conviction and affirm the judgment.

Railway Express Air Division, in San Diego, California, close to the Mexican border, received from a "Mexican fellow" a carton for shipment to appellant, a New York watch dealer, at appellant's home address in Brook-

lyn, New York. R. E. A. notified a Customs Agent, and the next day, when the same person brought in another carton, with the same consignor and consignee indicated, the carton when examined by an electronic device appeared to contain radioactive material. Thereafter, a Customs Agent at Idlewild Airport located and examined the first carton, which examination also indicated the presence of radioactive material. With permission of R. E. A., the package was opened and found to contain 2,149 Swiss watch movements without any importer's symbol. The movements were replaced in the package, the package resealed, and a search warrant obtained. With the assistance of R. E. A., a Customs Agent was clothed and equipped as an R. E. A. employee and made the delivery of both packages. Half an hour later, dressed in civilian clothes, the agent returned to Blum's premises, identified himself and asked for the packages. The appellant told the agent the whereabouts of the packages, in a utility room of Blum's house and the agent took the packages and arrested Blum. Blum when questioned about the cartons said they might be cutlery (one was mislabeled cutlery). When asked to open them, he refused, stating that they might be watches. Blum's explanation of their receipt was that one Sluis, the named consignor, whom he had met twice (and never saw again) had asked him to allow packages to be sent to his house for Sluis as a favor.

The heart of this appeal is an attack on the admissibility and sufficiency of the government's proof of illegal importation. The government put on competent expert testimony to establish that the watches were Swiss made "Altair" watches and that they were made within the preceding five years. Pursuant to a 1936 agreement with Switzerland, watch movements exported to the United States from Switzerland must be stamped with a mark

to distinguish each United States importer. Except for three which have an expired stamp, the watch movements were unstamped, and the testimony indicated that all these movements were manufactured in Switzerland after 1954. According to a directive in a 1940 letter from the Commissioner of Customs, all Customs Collectors were to furnish full particulars to the Swiss Consul General in New York in cases where Swiss watches and movements are imported without a distinguishing symbol stamped on them.

In order to prove unlawful importation, the United States proceeded on the theory that the watch movements could not have entered the United States lawfully without some official record being made of the importation. Thus, the government introduced certifications by 45 Collectors of Customs that they found no record of the importation of Swiss watch movements since 1954 that corresponded to the movements found in the defendant's possession. This proof was clearly not conclusive, for it omitted New York and five of the certificates failed to check back to 1954. But the government also introduced a certificate from the State Department that the annexed document was a true copy from its files of a note from the Swiss Embassy and of a declaration by the Swiss Consul in New York. The Consulate declared that its office kept records of inquiries and replies regarding the importation of Swiss watches sans symbols, that the Consul General was the official custodian of the official records, and that no record of a report relating to watch movements of the description of those found in the defendant's possession had been addressed to the Consulate in New York since 1954.

Appellant sought to show that there had been Customs auctions at Los Angeles of illegally imported Swiss watch movements. This did not, however, reflect upon the gov-

ernment's proof as to non-importation of "Altair" watches of the type seized here.

The reports from the other collectors' offices may have some probative value even though some years are missing from some five of the reports. Regardless of this, however, the proof as to the agreement to report to the Swiss New York Consulate all unmarked movements, the instructions and practice of all Customs officers to do so, and the certificate as to lack of such reports to the Consulate concerning watch movements of the description of these movements, for the entire period in question, is sufficient to base a finding of unlawful importation if the certificate of the Consul General was properly admissible.

That it was admissible we have no doubt. Rule 27 of the Rules of Criminal Procedure provides that an official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions. Rule 26 provides that admissibility of evidence generally in criminal trials shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. Rule 44 of the Federal Rules of Civil Procedure provides for the authentication of official records. For the purpose of this section, since the record is that of an official agency of a foreign government, the certificate of the Swiss Consul General, attested by the Swiss Ambassador and transmitted through the Secretary of State of the United States, complies with the spirit and terms of Rule 44(a). Even were we to find otherwise, the keeping of such records in the regular course of business of the Consulate General is sufficiently established to support their admissibility under 18 U. S. C. Sec. 1732, made applicable by F. R. C. 44(c) and F. R. Crim. Proc. 26 and 27. See discussion in United States

v. New York Foreign Trade Zone Operators, 304 F. 2d 792 (2 Cir. 1962).

The other claimed errors require little discussion. Objection was taken to evidence as to the finding of 22 similar unmarked watch movements in defendant's house. Whether or not this objection was well taken, the judge's action in striking the evidence and instructing the jury to disregard it cured any possible prejudicial error.

We find no merit in the claim of unreasonable search and seizure. R. E. A. had a right to open the carton and examine the contents, which were misdeclared on the waybill. The electronic devices had indicated that the contents were other than the declared cutlery, justifying inspection under the right reserved in R. E. A.'s Express Classification.

The judgment is affirmed.

Judgment and Commitment

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

No. 61-CR-64

UNITED STATES OF AMERICA

v.

MAX BLUM

On this 25th day of January, 1963 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon a verdict of guilty of the offense of Violating T-18 U. S. C. Secs. 545 and 2, in that on or about July 18, 1960, the defendant and another, did knowingly, wilfully, unlawfully and fraudulently facilitate the transportation after importation of merchandise imported into the United States approximately Two Thousand One Hundred Forty-Nine (2,149) Swiss watch movements, knowing the same to have been imported into the United States contrary to law as charged in counts 1 and 3 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrray being shown or appearing to the Court.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) months on each of counts 1 and 3 to run concurrently. Defendant is placed in custody of his Attorney Mr. Beerman for 1 day.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Walter Bruchhausen
United States District Judge.

Petition for Rehearing En Banc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

v.

MAX BLUM,

Defendant-Appellant.

Beerman, Gaspari & Beerman, New York, N. Y., for petitioner,

As no active circuit judge has requested that this case be reheard en banc, and as Judge Swan, who is qualified to vote thereon by virtue of 28 U. S. C. § 43 votes to deny, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

8 April 1964

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAX BLUM,

Defendant-Appellant.

Beerman, Gaspari & Beerman, New York, N. Y., for petitioner.

Petition denied.

J. E. L.
T. W. S.
J. J. S.
U. S. C. JJ.

8 April 1964

Government's Exhibit 12

UNITED STATES OF AMERICA

[EMBLEM]

TREASURY DEPARTMENT

WASHINGTON

October 15, 1962
(Date)

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I certify that the annexed is a true copy of Bureau of Customs Circular Letter No. 2088, dated June 19, 1940, on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

(Name Illegible)
Deputy Commissioner
Investigations & Enforcement
Bureau of Customs

(SEAL)

IN REPLY REFER TO
363.3511

TREASURY DEPARTMENT

BUREAU OF CUSTOMS
WASHINGTON

[EMBLEM]

OFFICE OF THE COMMISSIONER

ADDRESS REPLY TO
COMMISSIONER OF CUSTOMS

(Manuscript:) Confidential—W E H

BUREAU OF CUSTOMS
CIRCULAR LETTER No. 2088

Jun 19 1940

To Collectors of Customs and Others Concerned:

Re: Importations of watches and watch movements subject to the system of regulation under the declaration annexed to the Swiss trade agreement (T.D. 48093). Bureau of Customs circular letter 1559, dated May 21, 1936, superseded.

There has been presented for the Bureau's decision the question whether Swiss watches and watch movements should be released to the importer when a Swiss export permit has not been obtained and presented and when the importer's distinguishing symbol does not appear on the articles, as provided under the system of regulation

outlined in the declaration annexed to the Swiss trade agreement; also, whether, in the absence of the Swiss export permit, a bond should be taken for the production of such permit.

There is no authority of law or regulation administered by this Bureau for the taking of a bond to produce a Swiss export permit. Swiss watches and watch movements for which no Swiss export permit is presented or which do not bear the importer's distinctive mark should not be prohibited entry for those reasons alone. However, the absence of the Swiss export permit or the distinguishing symbol may be an indication of the violation or an attempted violation of the customs laws, and the merchandise should not be released unless and until the collector shall be satisfied of the legality of the transaction. If, after full investigation, there is nothing before the collector to cause suspicion that there has been a violation or an attempted violation of the laws of the United States, the articles should be released upon full compliance with the applicable customs laws and regulations.

In all cases where Swiss watches and watch movements are imported without a Swiss export permit or the distinguishing symbol, as required in pursuance of the declaration under the Swiss trade agreement, the Swiss consul general at New York should be furnished full particulars concerning the transaction.

Bureau of Customs circular letter 1559, dated May 21, 1936, is hereby superseded.

For convenient reference in this connection, the revised regulations issued by the Swiss Watch Chamber of Commerce relating to the non-requirement of Swiss export permits for shipments to the United States of Swiss

watches and watch movements sold at retail, announced in Bureau of Customs circular letter 1901, dated October 4, 1938, are restated below:

"Shipments of watches—to a maximum of 5 pieces—under Nos. 935 and 936 of the tariff, addressed to private persons in the United States by Swiss watch stores (retail stores) can be exported without the prescribed visa by the Swiss Watch Chamber and without the 'Export Permit.' For shipments of more than 5 watches, declaration form 19 HO must be visaed by the Swiss Watch Chamber and the 'Export Permit' must be obtained.

"As for shipments addressed by watch stores (retail stores) to passengers who take the watches along with them when sailing from a European port to the United States of America, the aboye-mentioned exemption is fixed at a maximum of 10 watches under Nos. 935 and 936 of the tariff. On declaration 19 HO which will be made out by the shipper, but will not be visaed by the Swiss Watch Chamber, the following notation will be made: 'These articles are being taken along to the United States by the passenger.'"

BASIL MORRIS
Commissioner of Customs.

Government's Exhibit 15

No. 62/8105

UNITED STATES OF AMERICA

(EMBLEM)

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I CERTIFY That the document hereunto annexed is a true copy from the files of the Department of State of a note from the Embassy of Switzerland, Washington, D. C. to the Secretary of State, United States Department of State, dated November 6, 1962, and enclosing a declaration by Mr. Hans William Gasser, Consul General of Switzerland, New York, New York, dated November 5, 1962, concerning the records of the Consulate General relating to the importation of unsymbolled watch or watch movements manufactured by Jos. Boiliat Fils, bearing the trademark, "Altair", authenticated November 6, 1962, on its reverse side, by the Embassy of Switzerland, Washington, D. C.

IN TESTIMONY WHEREOF, I, DEAN RUSK, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this sixth day of November, 1962.

DEAN RUSK
Secretary of State.

BY BARBARA HARTMAN,
Authentication Officer, Department of State.

(Seal)

(Emblem)

AMBASSADE DE SUISSE

The Ambassador of Switzerland presents his compliments to the Honorable the Secretary of State and has the honor to acknowledge the receipt of his note, dated October 26, 1962, transmitting a request from the United States Department of Justice for Mr. Rudolph Neeser, Consul of the Swiss Consulate General in New York City, to testify on behalf of the United States Government in criminal proceedings entitled *United States* v. *Max Blum* before the United States District Court for the Eastern District of New York. Mr. Neeser was to testify that no report had been made to the Swiss Consulate General in accordance with the requirements stated in Bureau of Customs Circular Letter No. 2088, dated June 19, 1940, concerning the arrival at any port of entry of the approximately 2150 unsymbolled watches and watch movements concerned in the case.

The question has been submitted to the Swiss Government which has decided that, for reasons of principle, Mr. Neeser cannot be authorized to testify before the United States District Court for the Eastern District of New York or any other Court.

However, the Swiss Government has authorized the Swiss Consul General in New York, Mr. Hans W. Gasser, to sign a declaration concerning the matter with respect to which Mr. Neeser was asked to testify. The Ambassador of Switzerland has the honor to enclose this declaration herewith.

The Ambassador of Switzerland avails himself of this opportunity to renew to the Honorable the Secretary of State the assurances of his highest consideration.

Washington, November 6, 1962

To the Honorable the Secretary of State
U.S. State Department
Washington, D.C.

(Emblem)

1 Enclosure

I, H. W. Gasser, hereby affirm and certify the following: I am the Consul General of Switzerland in New York, New York, U.S.A., duly accredited to represent the interests of the Swiss Confederation and its citizens at that city. Pursuant to Swiss law and the regulations and instructions of my government, I am authorized to certify the existence and non-existence of records required to be kept in the office of the Swiss Consulate General at New York, and I am the official custodian of such records. My office keeps records of any inquiries or replies directed to this consulate regarding the importation and arrival of Swiss-made watches and watch movements which do not bear the distinguishing mark or symbol assigned to the United States importers as required by paragraph three of the Declaration annexed to and forming a part of the trade agreement concluded 9 January 1936 between the President of the United States of America and the Swiss Federal Council. I hereby affirm and certify that after diligent search of the records of this consulate general no document, letter or entry, evidencing the making of such inquiry, relating to an importation of unsymbolized watch or watch movements manufactured by Jos. Boulat Fils, and bearing trade name "Altair" since first of January 1954 is found to exist in the records of this consulate general.

HANS WILLIAM GASSER
The Consul General of Switzerland

New York, New York
November 5, 1962.
No. 1404.6g

(EMBLEM)